87-232

Supreme Court, U.S.
FILED
AUG 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 1987

MONY LEICHIHMAN,

Petitioner,

vs.

PICKWICK INTERNATIONAL AND AMERICAN CAN COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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224-7631 — Review Publishing Co., 287

QUESTIONS PRESENTED FOR REVIEW

1. In ruling on a motion for a new trial on the grounds that a special jury verdict is against the weight of the evidence in a case in which the issues are simple but sworn testimony is in conflict may the trial court disregard the jury's assessment of the credibility of the witnesses?

The Court of Appeals in effect held, "Yes," upholding the district court.

2. In ruling on a motion for a new trial on the grounds that a jury verdict is against the weight of the evidence when the jury has returned a special verdict specifically approving two separate theories of liability may the trial court grant a new trial on both theories based on a stated rationale which is only logically applicable to one of the two theories?

The Court of Appeals in effect held, "Yes," upholding the district court.

LIST OF PARTIES AND AFFILIATES

Plaintiff:

Mr. Mony Leichihman, an individual.

Defendants and Affiliates:

American Can Company,
which has recently been renamed Primerica Corporation
Pickwick International, Inc.
Musicland Stores
Sam Goode Records

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I. The Court of Appeals applied an improper standard in allowing the trial court to disregard the jury's assessment of the credibility of the witnesses in granting a motion for a new trial on the grounds that the special jury verdict was against the weight of the evidence in a case in which the issues were simple and the sworn testimony of the parties was in conflict.

There is a split among the Federal Circuit Courts of Appeals on this standard and the Eighth Circuit decision below is aligned with the incorrect standard 10

II. The standard applied by the Court of Appeals allowed the trial court to abuse its discretion in granting a new trial on the grounds that the verdict was against the weight of the evidence when the jury returned a special verdict specifically approving two separate theories of liability and the trial court's stated rationale for granting the

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new trial was only logically applicable to one of the two theories.

This is an important question of federal law which has not been but should be settled by this court 20

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IN THE

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MONY LEICHIHMAN,

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PICKWICK INTERNATIONAL AND AMERICAN CAN COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner Mony Leichihman respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above proceedings on March 24, 1987 (A. p. 2-19) together with the order of said court denying the petition for rehearing entered on May 7, 1987. (A. p. 1-2).

OPINIONS BELOW

The March 24, 1987 opinion of the Court of Appeals for the Eighth Circuit is reported at 814 F.2d 1263 (8th Cir. 1987) and is reprinted in the Appendix hereto. (A. p. 3-19).

The August 15, 1984 Memorandum and Order of the District Court for the District of Minnesota is reported at 589 F. Supp. 831 (D. Minn. 1984) and is reprinted in the Appendix hereto. (A. p. 21-25).

JURISDICTIONAL STATEMENT

The final judgment was entered in favor of Respondents after a second jury trial by the U.S. District Court for the District of Minnesota—Fourth Division and appeal to the U.S. Circuit Court of Appeals for the Eighth Circuit on March 24, 1987.

Petitioner's timely Petition For Rehearing was denied by the Court of Appeals by an Order entered May 7, 1987. A certified copy of the Judgment and Mandate from the Court of Appeals was filed with the U.S. District Court for the District of Minnesota—Fourth Division on May 18, 1987.

Jurisdiction of the United States Supreme Court in this matter is invoked under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101 (c) and Rules 20.2 and 20.4, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

I. Procedural Background

This is an age discrimination case brought by an employee, Mony Leichihman, against his employer, Pickwick International, and its parent, the American Can Company. It is brought under the Age Discrimination In Employment Act (29 U.S.C. § 261, *et seq.*) and the Minnesota Human Rights Act (Minn. Stat. § 363.01 *et seq.*).

Leichihman asserts two theories of liability. First, he claims that Pickwick, under pressure from its parent American Can, implemented certain cost-cutting reduction-in-force policies which caused Leichihman to be terminated with his age being a determining factor ("The Reduction-in-force Claim"). Second, Leichihman claims that at the time of his termination other positions became available with Pickwick for which he was qualified but which Pickwick denied him due to age discrimination ("The Failure to Relocate Claim").

This action was tried to a jury twice. The first trial resulted in a special verdict (A. p. 27-28) and judgment (A. p. 26) in favor of Leichihman in the amount of $60,000 on both claims. The district court denied Pickwick's motion for J.N.O.V. but granted a new trial stating that the verdict was against the weight of the evidence. (A. p. 21-25).

Leichihman was precluded from seeking review of the order granting the new trial until after completion of the second trial.

The second trial resulted in a verdict in favor of Pickwick on December 20, 1985. Judgment was entered thereon on January 3, 1986 (A. p. 20) and Leichihman's motion for reinstatement of the first judgment or a new trial was denied on March 4, 1986. (A. p. 19). Leichihman appealed to the U.S. Court of Appeals for the Eighth Circuit on April 2, 1986. The Court of Appeals affirmed the District Court judgment on March 24, 1987 (A. p. 3-19) and denied Leichihman's Petition For Rehearing on May 7, 1987. (A. p. 1-2). The District Court filed a certified copy of the Court of Appeals Judgment and Mandate on May 18, 1987.

II. Statement Of Facts

Since Leichihman's claim in this Petition is that the Court of Appeals incorrectly affirmed the first trial court's ruling that the special jury verdict in favor of Leichihman was not supported by the weight of the evidence, this Statement of Facts will be taken from the transcript of the first trial.

Pickwick International is one of the largest distributors of phonograph records and tapes in the United States. Pickwick became a wholly-owned subsidiary of American Can Company in 1977. Pickwick stocks record departments in discount and department stores such as K-Mart—Sears—Dayton/Hud-

son's, etc. through its "Rack" Division. Pickwick also sells records and tapes nationally through several chains of its own retail stores (such as Musicland Stores) through its "Retail" Division.

Mony Leichihman was 58 years old when he was terminated by Pickwick on July 24, 1981.

Leichihman immigrated to the United States in 1965 from Romania at the age of 41. Prior thereto, Leichihman had received the equivalency of a Ph.D. in economics from the University of Frunza, U.S.S.R., and had worked 18 years in the textile and printing industries of Russia and Romania rising to the position of Financial Control Manager of various warehouse operations.

Leichihman was hired by Pickwick in May, 1966 as an entry level record packer. After a few months, however, he was promoted to Supervisor of the Customer Returns Department. In late 1978, Leichihman was promoted to the title he held until his termination, Returns Quality Control Manager. As Returns Quality Control Manager, Leichihman was responsible for reviewing and directing the returns of customer merchandise to Pickwick's Rack and Retail divisions for credits of $90 to $100 million annually.

Leichihman received all positive performance evaluations during his entire period of employment. Leichihman received every annual merit and wage increase given by Pickwick to employees in his salary grade. At trial Pickwick admitted that Leichihman was not terminated for job performance.

In 1977, Pickwick was acquired by American Can Company and for the last four years of Leichihman's employment, the company operated as a wholly-owned subsidiary of American Can. Beginning in 1979-1980, Pickwick began suffering financial setbacks. James Moran, a Pickwick Executive Vice

President, testified that he recommended to American Can that the Rack Division of Pickwick be liquidated. Moran, however, was told by American Can that the Division could not be liquidated for financial reasons and instead Moran was ordered to make drastic cuts in Pickwick's operational costs. Moran testified he did so. A substantial portion of these cost savings were the results of a reorganization which split Pickwick's divisions into separate companies and an enormous reduction in Pickwick's work force which included the elimination of Leichihman's position in 1981.

Dr. Roger Walker, Chairman of the Economics Department of Hamline University, testified on behalf of Leichihman as an expert witness in employment economics and statistics. Dr. Walker testified that during the period from 1979 through 1981, Pickwick's employment policies with respect to terminations and layoffs had a disparate impact on its older employees. Dr. Walker testified that during this period the ratio of Pickwick's older employees grew smaller and smaller and the ratio of its younger employees grew larger and larger in comparison with both the national work force and the local Minneapolis/St. Paul work force by statistically significant levels. Dr. Walker testified that, based on generally accepted standard deviation analysis, Pickwick's work force was so statistically "out-of-skew" when compared with national and local work force age profiles (in excess of 12 to 20 standard deviations), that *age could not have been a neutral factor* in the termination policies and practices of the company at the time of Leichihman's termination.

Dr. Eaton testified on behalf of Pickwick as a statistical expert. Dr. Eaton admitted that Pickwick's work force was statistically "out-of-skew" with national and local work force

age profiles but stated that age discrimination was only one of the possible reasons for it, but not necessarily the reason.

David Irvin, Pickwick's Manager of Employee Relations, corroborated Dr. Walker's findings and opinion when he admitted, "We don't have too many people reaching that age [retirement age] that are currently employed here."

In December of 1980 as part of Moran's cost-cutting activities Pickwick was split into separate companies, and Leichihman was assigned to an unneeded position in the new Retail company in that 95% of his former responsibilities were taken from him and transferred to the new Rack/Distribution company. Those former duties were assigned to a substantially younger employee, Darlene Beightol, while only 5% of his former responsibilities were retained in his new position with the "Retail" company. During cross-examination Beightol, who was still a Pickwick employee, attempted to minimize the responsibilities formerly held by Leichihman which she undertook after the company split, but she did admit to having given inconsistent testimony in this regard at her pretrial deposition. For example, when asked, "Did you take on some of the functions that Mony supposedly—or was supposedly supposed to carry on during 1978 through 1980?" Her answer prior to trial was: "All of them." In response to the following question before trial, "So you took on Mony's functions with regard to Rack?" She responded, "Right."

Then in March, 1981 two months after having 95% of his duties removed, a Pickwick "task force" headed by Ed Erdmann concluded that Leichihman's new job was unnecessary. (As will be discussed later, this is the same Ed Erdmann who, on more than one occasion, made remarks about the age of Pickwick employees under circumstances giving inferences of age discrimination.) At trial Pickwick tried to present the

task force report as an age neutral document by claiming it also contains recommendations to terminate seven other first-line supervisory positions similar to Leichihman's in the Minneapolis warehouse, and that the seven other positions were held by younger employees. Irvin and Erdmann were challenged on the witness stand, however, to show where in the task force report these recommendations were made. They were unable to do so because there was no reference to them in it.

Having set up Leichihman's position for elimination by the spring of 1981, Pickwick waited until July, 1981 to actually effectuate his termination. Pickwick had a policy in effect at that time which required it to place any employee whose job had been eliminated in another available position for which the employee was qualified.

Several other positions became available during this period for which Leichihman was qualified.

Joy Harris was employed by Pickwick as Manager of Financial Systems and reported directly to Ed Erdmann. Harris testified that during June and July, 1981 she became aware of openings in her department for two Operations Support Analysts.

Harris also testified that Erdmann, who had been head of the task force that recommended elimination of Leichihman's position, called her into his office regarding these openings and told her he wanted her to "do him a favor." Erdmann told Harris that a situation had developed in the warehouse [where Leichihman worked] which was "strictly political" in nature. Erdmann stated that Nick Jaksich, Leichihman's supervisor, would be contacting Harris to set up an interview for "an older man" with a PhD from Europe [Leichihman] for the Operations Support Analyst position. Erdmann indicated to Harris,

however, that she was "just supposed to go through the motions" but not offer the position to the older man. It was unrefuted that the "older man" referred to by Erdmann who was to be given the sham opportunity for job relocation was Leichihman. Harris testified Jaksich never contacted her to set up the interview.

On cross-examination, Erdmann admitted having a conversation with Harris, including his admission as to the possible use of the term "old man," but denied telling her that she was just supposed to "go through the motions". Harris also testified that on another occasion Erdmann made remarks to her with respect to her own age (54) under circumstances which she inferred age discrimination. In fact, Harris also filed an age discrimination claim against Pickwick and Erdmann.

Leichihman was terminated a few weeks later on July 24, 1981 at a meeting with Irvin and Jaksich. Leichihman was told his position had been eliminated due to budgetary reasons. There is a sharp dispute in the testimony between Irvin and Jaksich on the one hand and Leichihman on the other with respect to all the discussion at this meeting. Jaksich testified Leichihman was first told about the available positions in Harris' department at this meeting and that Leichihman refused to interview for them. Irvin, however, contradicted Jaksich and testified Leichihman was first told about it a week earlier. Leichihman adamantly denied that he was ever informed about the openings and testified he was never given an opportunity to interview for them.

Irvin's testimony was impeached by his admission that, in connection with this case, he had earlier signed an Affidavit testifying that one of the positions for which Leichihman was being considered became available by the resignation of Marshall Grice. At trial, however, Irvin admitted that his prior

testimony was wrong, since Marshall Grice did not leave his position until seven or eight months after Leichihman's termination.

Furthermore, Harris testified that only individuals in their twenties were considered for the open positions of Operations Support Analyst. The two positions were eventually filled by twenty-year-old individuals, one who had substantially less seniority than Leichihman and one who was hired from outside the company despite the fact the company was downsizing. Jaksich, Irvin and Erdmann all admitted they considered Leichihman eligible to interview for the positions of Operations Support Analysts, based upon his qualifications. Moreover, Harris, who would have made the final decision on filling the position, testified she felt Leichihman was qualified for the position.

Pickwick admitted that Leichihman was not terminated due to poor performance but claimed he was the casualty of an age neutral reduction-in-force policy. With respect to the Failure to Relocate claim Pickwick claimed Leichihman was given an opportunity for another position but voluntarily refused it.

STATEMENT OF FEDERAL JURISDICTION FOR THE UNDERLYING CLAIM

The U.S. District Court for the District of Minnesota had jurisdiction over this action under (a) 28 U.S.C. § 1331 in that this is a matter arising under the laws of the United States—29 U.S.C. § 261, *et seq.*; (b) 28 U.S.C. § 1343 in that this is an action to recover damages and secure equitable relief under an Act of Congress providing for the protection of civil rights; and (c) under the pendant jurisdiction of the District Court in that this is an action seeking damages and equitable relief under the Minnesota Human Rights Act (Minn. Stat. § 363.01,

et seq.) arising out of the same facts and circumstances as plaintiff's federal question claim.

The appellate jurisdiction of the U.S. Court of Appeals for the Eighth Circuit was invoked under 28 U.S.C. § 1291 and 1294 in that plaintiff appealed from the final decision of the District Court of the United States to the Court of Appeals for the circuit embracing the district.

ARGUMENT IN FAVOR OF THE ALLOWANCE OF THE WRIT

I. The Court of Appeals Applied an Improper Standard in Allowing the Trial Court to Disregard the Jury's Assessment of the Credibility of the Witnesses in Granting a Motion for a New Trial on the Grounds that the Special Jury Verdict was Against the Weight of the Evidence in a Case in Which the Issues were Simple and the Sworn Testimony of the Parties was in Conflict.

There is a Split Among the Federal Circuit Courts of Appeals on This Standard and the Eighth Circuit Decision Below is Aligned With the Incorrect Standard.

Leichihman's Failure to Relocate Claim was based upon a simple issue which resulted in sharp conflict in the testimony of the parties. Thus the outcome depended upon the credibility of the witnesses.

Leichihman claimed Pickwick's decision to terminate him rather than give him an opportunity to transfer to one of the two available positions was motivated by age discrimination. He adamantly denied he was ever told about or given the opportunity to interview for the positions. Leichiman's testimony was supported by Joy Harris who testified only individuals in their twenties were considered for and given the available

positions and that they had less seniority than Leichihman. Harris also testified as to the pretextual opportunity Pickwick, through Erdmann, attempted to set up to give the appearance that Leichihman was going to be given an opportunity for the jobs. Harris also testified that Erdmann identified Leichihman by his advanced age rather than name while discussing the scheme. Harris also testified Erdmann later engaged in age discrimination with respect to her employment. Leichihman's claim was also supported inferentially by Dr. Walker's statistical evidence.

On the other hand Pickwick claimed Leichihman's failure to have an opportunity for relocation was not age motivated but due to his voluntary refusal to interview. Irvin and Jaksich so testified. Pickwick attempted to refute Harris' testimony through Erdmann's denial that he told her it was a sham opportunity and by claiming Harris was biased due to her own claims against the Company. Pickwick's expert attempted to limit the scope of Dr. Walker's opinion.

The jury, which consisted of a cross section of eight individuals from the community, observed the witnesses and decided to believe Leichihman, Harris, and Walker. The trial court, in ruling on the motion for a new trial, disagreed and gave more credence to the testimony of the employer's witnesses. (A. p. 24).

In denying Pickwick's motion for JNOV the trial court summarized some of the evidence as follows:

> Plaintiff's assignment to retail after the split, the facts that older more senior employees cost more in terms of salary and benefits than newer, younger employees, the testimony of [Joy] Harris, the existence of Pickwick's employee relocation policy and the discordant testimony of Pickwick employees about the date and substance of

> Plaintiff's last meeting with his superiors are some of the evidence upon which the jury could have rested its verdict. Simply because Pickwick infers economic motive from Plaintiff's evidence does not mean it was not unreasonable for the jury to infer a discriminatory motive. (A. p. 23-24).

In denying the motion for JNOV the trial court correctly stated, "in considering the sufficiency of the evidence in support of the verdict, the court is not free to weigh the evidence or *pass on the credibility of witnesses* or substitute its judgment of the facts for that of the jury." (A. p. 21-22, emphasis added).

In granting the motion for a new trial because the verdict is against the weight of the evidence, however, the court indicated it had broader discretion. It is clear from the court's ruling, however, it abused that discretion by invading the province of the jury and disregarding its assessment of the credibility of the witnesses.

There is a clear split among the Circuit Courts of Appeals as to whether a trial court abuses its discretion in granting a motion for a new trial on the grounds that the verdict is against the weight of the evidence in a case in which the issues are simple and the testimony is in conflict when the court disagrees with the jury regarding the credibility of the witnesses. The landmark case on the issue is *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960). In *Schenley* the Third Circuit noted that there was no consensus of opinion in case decisions prior to 1960 as to the exact standards to be used by trial courts in granting a new trial and the criteria to be employed by an appellate tribunal charged with reviewing a trial judge's decision. The *Lind* majority drew a "sharp distinction" between new trials granted because (1) the jury

verdict was against the weight of the evidence and (2) new trials ordered for other reasons: (for example, evidence improperly admitted, prejudicial statements made by counsel, improper charges to the jury, etc.) *Lind* noted that in the first type of case it is the jury itself which fails properly to perform the functions confided to it by law. In the latter type of cases, however, something has occurred in the course of the trial which has resulted or which may have resulted in the jury receiving a distorted, incorrect, or incomplete view of the operative facts. In other words some undesirable element intruded into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible.

Lind went on to reason that in the second type of cases there was no usurpation by the court of the prime function of the jury as a trier of fact, and therefore the trial judge should be allowed wide discretion in granting or refusing a new trial.

> But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent, *substituted his judgment of the facts and the credibility of the witnesses for that of the jury.* Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime functions of the jury as the trier of the facts. (*Lind*, 278 F.2d 79, 90).

The *Lind* decision went on to formulate a new and clearly appropriate standard. While the Third Circuit would generally continue to leave the granting of a new trial to the sound

discretion of the trial court, in a case where the subject matter of the litigation was simple and the determination of issues depended upon the veracity of the witnesses the granting a new trial based upon the weight of the evidence would be considered to be an abuse of discretion.

The standard enunciated in *Lind* has been characterized as the commencement of a "modern trend" which has been followed by the First Circuit, *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978) and *Payton v. Abbott Labs*, 780 F.2d 147 (1st Cir. 1985); the Tenth Circuit, *Frank v. Bloom*, 634 F.2d 1245 (10th Cir. 1980); the Eleventh Circuit, *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982) and *J & H Auto Trim Co., Inc. v. Bellefonte Insurance Co.*, 677 F.2d 1365 (11th Cir. 1982); and the D. C. Circuit, *Vanderzee v. Karabatos*, 589 F.2d 723 (D. C. Cir. 1978) and *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D. C. Cir. 1969).

A number of other circuits, on the other hand, do not follow the *Lind* "modern trend" or the other cases cited above. For example in *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042 (2nd Cir. 1984) the Second Circuit held that the trial judge did not abuse her discretion in granting a new trial on the issue of contributory negligence. In discussing the standard to be applied in the Second Circuit the court acknowledged the wisdom of the majority decision in *Lind* only for the proposition that an appellate court should use close scrutiny in reviewing the grant of a new trial solely because the judge regards the verdict as against the weight of the evidence. The *Crane* decision, however, goes on to specifically adopt the test set forth in the *dissenting* opinion in *Lind* as "whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict." (*Crane* at 1048).

Similarly several other Circuits have refused to follow *Lind*.

In the Fourth Circuit the development of the standard has been checkered. In *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980) the court stated:

> The motion for a new trial on the merits, however, requires a review of the evidence under a different standard [than JNOV]. Under Rule 59, F. R. Civ. P., a trial court may weigh the evidence *and consider the credibility of the witnesses.* (*Wyatt, Id.*, at 891, emphasis added).

In *Abasiekong v. Shelby*, 744 F.2d 1055 (4th Cir. 1984), however, the author of the decision, who also had been on the *Wyatt* panel, cited *Wyatt*, and stated that in ruling on a motion for a new trial the trial court was permitted to "consider the credibility of the witnesses." The author, however, then cited *Lind* and reversed the grant of a new trial stating that the trial court appears to have abused its discretion in that the verdict was not against the clear weight of the evidence. (*Abasiekong, Id.* at 1059). In its most recent pronouncement, however, *Whalen v. Roanoke Co. Bd. of Sup.*, 769 F.2d 221 (4th Cir. 1985), a separate panel of the Fourth Circuit reinstituted the *Wyatt* standard and stated that the trial court could assess the credibility of witnesses in deciding whether to grant a new trial and remanded the case to the district court charging it to rule on the motion for a new trial "*making its own assessment of the credibility of the witnesses* and weight of the evidence" which was referred to as the "proper standard." (*Whalen, Id.*, at 226, emphasis added).

In *Eyer v. McDonough Power Equipment, Inc.*, 755 F.2d 416 (5th Cir. 1985) the standard set forth by the Fifth Circuit in ruling on whether a new trial should be granted as against the

weight of the evidence included, "according due deference to the trial judge's first line view of the testimony . . ." and ". . . his first hand opportunity to view the witnesses and their demeanor . . ." (*Eyer, Id.*, at 420).

Thus, the Second, Fourth, and Fifth Circuits have adopted standards which include authorizing trial courts to disagree with the jury regarding the credibility of witnesses in granting new trials based on the weight of the evidence.

The Eighth Circuit, like the Fourth, has had somewhat of a checkered history in developing its standard. In *Fireman's Fund Insurance Co. v. AALCO Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930, 35 L.Ed.2d 592, 93 S.Ct. 1371 (1973) the court appeared to be hinting that it might adopt the modern trend begun by *Lind*. In *Fireman's Fund*, the court reversed the trial court's granting of JNOV due to the existence of substantial evidence on the record in support of the verdict and the court also reversed the alternative grant of a new trial. In doing so the majority opinion stated the general rule that a trial court's grant of a new trial should be upheld unless it involved an abuse of discretion. The majority cited *Lind* but only for the proposition that a trial court should be afforded broad discretion in granting a new trial based upon *erroneously admitted evidence*. The *Fireman's Fund* majority, however, not being faced with that kind of a ruling, said that in a case where the evidence is such that reasonable men may differ as to the result, the determination should be properly left for the jury. The court, however, did not specifically state whether it was appropriate for the trial court to weigh the credibility of witnesses. The court nevertheless reversed the granting of the new trial because the majority felt, "as to the evidence within the record, there exists no significant weight factor favoring the defendant." (*Fireman's Fund, Id.*, at 187).

In *McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339 (8th Cir. 1983) the Eighth Circuit appeared to be moving

closer to adopting *Lind* by stating that a trial judge should be particularly reluctant to grant a new trial where the subject matter of the litigation is simple, where there exists no complicated evidence or where the legal principles presented are such that they would not confuse the jury. The court also stated that:

> The jury weighs the evidence and credibility of witnesses. The trial court can disturb a jury verdict only to prevent a miscarriage of justice.

The court went on to review the evidence in *McGee*, however, and reversed the trial court's granting of a new trial because the court was not convinced the jury had committed a "manifest injustice." The Circuit Court stopped short, however, of specifically stating that the trial court could not weigh the credibility of witnesses.

In more recent decisions, however, the Eighth Circuit has made it clear that it disagrees with *Lind* and its progeny. In both *Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir. 1984) and *Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 673 (8th Cir. 1985) the court clearly stated that in determining if a verdict is against the weight of the evidence, a trial court may "weigh the evidence, *disbelieve witnesses*, and grant a new trial even where there is substantial evidence to sustain the verdict."

In the present case Leichihman argued to the Eighth Circuit that the issue before the trial court was, essentially, a credibility determination for the jury rather than a weight of evidence issue. (A. p. 31-32). Thus Leichihman asked the Circuit Court to reverse the order of the first trial court which abused its discretion in granting a new trial.

In rejecting Leichihman's argument the Circuit Court stated that Leichihman failed to distinguish between the standard for granting a new trial and standard for JNOV. The court also

stated that in assessing the new trial motion a trial court is allowed to weigh the evidence itself. The court also cited its previous decision in *Brown, supra,* which had specifically held a trial court could *disbelieve witnesses,* and stated that even when there is substantial evidence in support of a verdict the trial court may conclude that there had been a miscarriage of justice. (A. p. 8). Other than the fact that the trial court believed Pickwick's witnesses rather than Leichihman's witnesses, however, the court never stated what the miscarriage of justice was.

Thus the Eighth Circuit has aligned itself with those circuits which allow a trial court to disregard the jury's assessment of the credibility of witnesses in granting a new trial based on the weight of the evidence even in a case where the issues are not complex and the outcome depends upon the witnesses' credibility.

The fact that the standard established in *Lind* and its progeny is the better view is obvious. The right to have the facts of a dispute determined by a jury is one of the fundamental rights afforded citizens of this country which is protected by the Seventh Amendment to the U.S. Constitution. *Lind* correctly points out that a trial court does not invade the province of the jury when it grants a new trial because a "pernicious" element, such as illegally admitted evidence, intrudes and prevents the jury from fulfilling its fundamental role. That role is usurped however where the court disregards the jury's assessment of the credibility of witnesses in a case which is not complex and the determination of issues depends upon—"whom do you believe?"

While it makes some sense to prefer a trial court's assessment of the credibility of witnesses rather than an appellate court's assessment, because a trial court has the first hand opportunity to view the demeanor of the witnesses, it makes no sense to prefer the judgment of a single jurist to that of six, eight or twelve members of the community who collec-

tively have a better opportunity than the trial court to observe the witnesses and to test their opinions of witness veracity against fellow jurors' before making a final decision.

Unless the new trial standard is made uniform among the circuits the right to a jury trial will be fundamentally different from circuit to circuit. A verdict which would be allowed to stand in the First, Third, Tenth, Eleventh and D. C. Circuits would not fare as well in the Second, Fourth, Fifth and Eighth Circuits. A right as fundamental as the right to a jury trial should not depend upon a caprice such as the location of the circuit.

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 88 L.Ed. 520, 64 S.Ct. 409 (1944), this court settled, once and for all, the standard to be applied in cases involving directed verdicts and judgments N.O.V. In doing so this court stated it had granted certiorari "to settle important problems as to litigants' rights to jury determinations." (*Tennant, Id.* 321 U.S. 29, 30, 64 S.Ct. 409, 410). Litigants' rights regarding new trials are just as important. In *Tennant* this court stated that when a trial court rules on a motion for a directed verdict it is the jury and not the court which is entitled to weigh the contradictory evidence and inferences, *judge the credibility of witnesses*, receive expert instructions, and draw the ultimate conclusion as to the facts. (321 U.S. at 35, 64 S.Ct. at 412). The Courts of Appeals have had no problem following that standard. In all circuits, courts are not allowed to judge the credibility of witnesses in ruling on motions for a directed verdict or judgment N.O.V.

This court needs to provide similar direction to the courts of appeals regarding the appropriateness of weighing the credibility of witnesses in ruling on motions for new trials, especially in cases where the issues are not complex and the outcome is dependent on witness credibility. This case would give this court such an opportunity.

II. The Standard Applied by the Court of Appeals Allowed the Trial Court to Abuse its Discretion in Granting a New Trial on the Grounds that the Verdict was Against the Weight of the Evidence when the Jury Returned a Special Verdict Specifically Approving Two Separate Theories of Liability and the Trial Court's Stated Rationale for Granting the New Trial was Only Logically Applicable to One of the Two Theories.

This is an Important Question of Federal Law Which Has Not Been But Should be Settled by this Court.

While the appellate and trial courts below both correctly stated that the decision to grant a new trial is within the sound discretion of the trial court (A. p. 10 and 23) it is also true that appellate courts may reverse such a decision in cases where that discretion has been abused. *Lucas v. American Mfg. Co.*, 630 F.2d 291 (5th Cir. 1980) and *Fireman's Fund Ins. Co. v. AALCO Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972) cert. denied, 410 U.S. 930, 35 L.Ed. 2d 592, 93 S.Ct. 1371 (1973).

In order for an appellate court to be able to ascertain whether or not the trial court has abused its discretion, however, the appellate court has to be able to determine the reason for the decision.

Leichihman made the argument before the Eighth Circuit, in the present case that the trial court's explanation of its attack on the weight of Leichihman's evidence was only logically applicable to one of Leichihman's two claims. (A. p. 10). Despite the fact the jury had found in Leichihman's favor on two claims, the trial court only gave one reason for his decision. The trial court asserted that the testimony of Pickwick's executives and managers about the harsh realities facing Pickwick after an industry-wide recession and the drastic

steps that had to be taken to salvage the company overwhelmed Leichihman's allegations and evidence of age discrimination. (A. p. 24).

Leichihman argued to the Eighth Circuit that the district court's stated rationale—that the harsh realities of the industry-wide recession required Pickwick to take drastic steps regarding its work force to salvage the company—was only logically applicable to Leichihman's claim that age discrimination was involved in Pickwick's reduction-in-force policies which included the elimination of Leichihman's position. (Leichihman's Reduction-in-force Claim). The trial court's rationale, Leichihman argued further, had nothing whatsoever to do with answering the question of why Leichihman did not receive one of the two available Operations Support Analyst positions for which he was qualified and which Pickwick's personnel policies required he receive. (Leichihman's Failure to Relocate Claim).

Despite the company's need to cut costs there was no evidence that it cancelled its relocation policy. Despite the fact the company was facing enormous financial reverses it decided it needed to *add* two Operations Support Analysts. The company, however, only interviewed applicants who were in their twenties for these two positions. Rather than give either of the positions to Leichihman, who was admittedly qualified for either position, Pickwick gave one of the positions to a twenty-year-old who had many years less experience with the company than Leichihman and gave the second position to a twenty-year-old from outside the company. How does the company's being confronted by harsh economic realities relate to any of these personnel decisions?

In addition, Pickwick attempted to set up a sham interview process for Leichihman to make it appear like they were com-

plying with their relocation policy and the Age Discrimination in Employment Act. How does the fact that Pickwick was facing harsh economic realities offset the weight of Joy Harris' testimony regarding her superior's specific instructions to "merely go through the motions" and not give an older employee a fair interview?

The jury not only found in Leichihman's favor regarding his Reduction-in-force Claim it also found in favor of his Failure to Relocate Claim. The trial court's analysis of the weight of the evidence regarding the drastic need for the reduction-in-force had nothing whatsoever to do with Leichihman's Failure to Relocate Claim.

The fact that the trial court granted a new trial on both Leichihman's claims under a theory which only logically disputed the weight of the evidence of one of the claims was an obvious abuse of discretion.

While the Circuit Court's decision below correctly stated that a district court must give reasons for concluding that the verdict is against the weight of the evidence, (A. p. 9) citing *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470, 474 (8th Cir. 1987) and *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985), such a requirement is meaningless if the court is allowed to state a reason which is not rationally related to or logically applicable to the jury finding being rejected. The Circuit Court answered Leichihman's argument by referring to the fact that the trial court's opinion used the plural in describing Leichihman's "claims" and Pickwick's "decisions." Thus, the Circuit Court concluded that the trial court must have "considered" both claims in arriving at its decision.

This conclusion, however, completely missed the thrust of Leichihman's argument and the standard which should have been applied. Leichihman did not and does not argue that the

first trial court failed to "refer" to both claims but that the trial court's single articulated rationale for rejecting both claims was not logically related or rationally applicable to the second claim. The result of applying the standard followed by the court below would be to allow trial courts merely to state that they applied the correct standard without requiring that they state reasons which can be tested on appeal.

This is an important and vital aspect of the new trial standard which this court as yet has not determined. While this court has given appellate and trial courts guidance regarding the standards to be applied in deciding motions for directed verdicts and judgments NOV, *Tennant, supra* at 19, it has not done so regarding the new trial standard. This case would give this court an opportunity not only to correct the injustice which occurred to Leichihman but to establish, once and for all, that trial courts must provide a *reasonable* explanation whenever a new trial is granted so that appellate courts can properly review whether a trial court's discretion has been abused.

CONCLUSIONS

For the foregoing reasons, the Petitioner Mony Leichihman respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above proceeding on March 24, 1987 together with the order of said court denying the petition for rehearing entered on March 7, 1987.

Respectfully submitted,

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Attorneys for Petitioner
Mony Leichihman

IN THE

Supreme Court of the United States

October Term, 1987

MONY LEICHIHMAN,

Petitioner,

vs.

PICKWICK INTERNATIONAL AND
AMERICAN CAN COMPANY,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

May 7, 1987

Mr. Stephen T. Refsell
200 South Fifth Street
Room 1800
Minneapolis, Minnesota 55402

Re: No. 86-5150-MN Mony Leichihman v. Pickwick International and American Can Company.

Dear Sir:

Enclosed please find copy of order entered today at the direction of the Court.

Sincerely,
LINDA L. PENBERTHY
Senior Deputy Clerk

rmh
Enclosure (1)
cc: Marcus Magnuson
Jon P. Parrington
Frank Dosal, Clerk, United States District Court
(District Court's No. Civ. #4-85-1171)
John Schroder, Clerk's Office, St. Paul, Minnesota
Hon. James Rosenbaum
West Publishing Company
Commerce Clearing House
National Center for Automated Information Retrieval
Prentice-Hall, Inc.
Bureau of National Affairs

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5150-MN

MONY LEICHIHMAN,

Appellant,

vs.

PICKWICK INTERNATIONAL AND
AMERICAN CAN COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MINNESOTA

Appellant's petition for rehearing has been considered by the Court and is hereby denied.

Order Entered at the Direction of the Court:
ROBERT D. ST. VRAIN
Clerk, United States Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH DISTRICT

No. 86-5150MN

MONY LEICHIHMAN,

Appellant,

v.

PICKWICK INTERNATIONAL AND
AMERICAN CAN COMPANY,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

March 24, 1987.

Appellees will recover from the appellant the sum of $184.81.

A true copy:

ATTEST:

ROBERT D. ST. VRAIN

Clerk, U. S. Court of Appeals, 8th Circuit

MANDATE ISSUED 5/14/87

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5150

MONY LEICHIHMAN,

Appellant,

v.

PICKWICK INTERNATIONAL AND
AMERICAN CAN COMPANY,

Appellees.

Submitted: December 9, 1986
Filed: March 24, 1987

Appeal from the United States District Court for the District of Minnesota.

Before ROSS, JOHN R. GIBSON and FAGG, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Mony Leichihman appeals from a judgment entered on a jury verdict after the second trial of Leichihman's age discrimination claims brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982), and the Minnesota Human Rights Act, Minn. Stat. Ann. §§ 363.01-.14 (West Supp. 1987). At the first trial, Leichihman obtained a jury verdict and judgment for $60,000, but the district court[1] granted Pickwick's motion for a new trial on the ground that the verdict was against the weight of the evidence. On appeal, Leichihman argues that the district court erred in granting Pickwick a new trial after his favorable verdict; in granting summary judgment dismissing American Can Company, Pickwick's parent company, as a party prior to the first trial; and in denying Leichihman's motion for a new trial after he received an unfavorable verdict in the second trial.[2] Finding no error in any of these rulings, we affirm.

Pickwick, a subsidiary of American Can Company since 1977, is one of the largest distributors of records, tapes and stereo products in the United States. Through its "rack" division, Pickwick stocks record departments in various discount and department stores. Through its retail division, Pickwick sells these items in its own retail chains, such as the Musicland stores.

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[1] The Honorable Edward J. Devitt, Senior United States District Judge for the District of Minnesota, presided at the first trial.

[2] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota, presided at the second trial.

In 1965, Leichihman emigrated with his wife and daughter from Romania to the United States. In 1966, he was hired by J. L. Marsh & Heilicher Distribution, a Pickwick predecessor, as an entry-level record packer, and within a few months was promoted to supervisor in the Customer Returns department. In 1978, he was promoted to the position of Quality Control Manager. He held this position until Pickwick was reorganized in 1981.

The reorganization was one of the cost-cutting measures implemented by Pickwick to help it recover from tremendous financial setbacks that it began to incur in 1980. In the reorganization, Pickwick split into two distinct companies; one operated the Musicland stores, the other was responsible for rack and distribution. Leichihman was assigned to the Musicland group. Leichihman testified that, because most of his work had been connected with rack and distribution, he lost about 95% of his responsibilities when the company split. The testimony also indicated that a substantial portion of Leichihman's functions were taken over by another younger Pickwick employee who had formerly reported to Leichihman, but who was assigned to the rack/distribution company in the reorganization.

In the spring of 1981, a company task force recommended further cost-cutting measures. The task force conducted a six-month study to identify areas of possible savings and came up with a number of ideas, including eliminating several jobs. One of the jobs recommended for elimination was Leichihman's new position in the retail company.

The recommendation to eliminate Leichihman's position came in March of 1981. Leichihman, however, was not fired until July. The parties strongly disputed the circumstances surrounding Leichihman's termination. Pickwick's stated policy is to place any laid-off employee in another position in

the company that fits the employee's qualifications and needs. In June and July of 1981, two Operations Support Analyst positions became available. Joy Harris, the Pickwick employee who was interviewing candidates for these positions, testified that Ed Erdmann, head of the cost-reduction task force, told her that an "older man" was going to come by for an interview and to simply "go through the motions" of interviewing Leichihman without actually offering him the job. At trial, Erdmann denied making such a statement, except to admit that he used the term "older man" to describe Leichihman. Erdmann and another Pickwick official also testified, contrary to Leichihman's testimony, that Pickwick offered Leichihman the opportunity to interview for these positions and he refused to do so.

At trial, Leichihman asserted two theories of liability. He claimed, first, that Pickwick's cost-cutting reduction-in-force policies had a disparate impact on Pickwick's older employees, including Leichihman. Second, he claimed that age discrimination was a determining factor in Pickwick's failure to give him a bona fide opportunity to relocate to another available position. The jury in the first trial returned a special verdict finding in favor of Leichihman on both theories and awarding him $60,000. Upon Pickwick's motion, the district court set aside the verdict as being against the weight of the evidence. The jury found for Pickwick in the second trial.

I.

A.

Leichihman's first argument is that Pickwick's motion for a new trial was untimely. This argument is meritless.

After the district court ordered entry of judgment on May 14, 1984, both parties jointly moved pursuant to Rule 60 of the Federal Rules of Civil Procedure to vacate the judgment. Rule

60 provides that errors in judgment arising from clerical mistakes or those arising from mistake, inadvertance, surprise, or excusable neglect may be corrected by the court. *See* Fed. R. Civ. P. 60(a), (b). As the parties stated in their motion, the district court had previously ruled that it would receive evidence on certain state, "front-pay," and liquidated damage claims after the verdict was returned. The clerk entered judgment, however, on May 9, 1974, before the presentation of this evidence. The motion furtner noted that in reliance on the Court's statement that further evidence would be received, Pickwick had not timely moved for judgment n.o.v. or for a new trial. The court granted the motion and vacated the judgment.

In his brief to this court, Leichihman claims that the statement in his motion to the district court that a clerical error had been made actually had no support, that it is clear that the entry of judgment "could not have been based on a clerical error," and that, in fact, the joint motion "amounted to nothing more than an agreement of the parties to enlarge the 10 day period set forth in Rules 50(b) and 59(b) for the filing of post-judgment motions." Appellant's Brief at 15. Leichihman then cites cases holding that neither the parties nor the court may extend the time for filing these post-trial motions, never acknowledging that in these cases no motion to vacate the judgment under Rule 60 had been made or granted. *See Fairway Center Corp. v. U.I.P. Corp.*, 491 F.2d 1092 (8th Cir. 1974); *Weir v. United States*, 339 F.2d 82 (8th Cir. 1964).

We are satisfied that the district court acted within its equitable authority under Rule 60 in vacating the judgment and that Pickwick's new trial motion was timely. Moreover, we find Leichihman's characterization of the Rule 60 motion as a post-trial motion made under Rule 50(b) or 59(b) to be inaccurate, at best.

B.

Leichihman asserts that the district court misapplied the proper legal standard in granting a new trial. He notes that the district judge denied Pickwick's motion for a judgment n.o.v., rejecting Pickwick's argument that there was *no* evidence to support an age discrimination claim. Appellant's Brief at 17. He then takes issue with the court's determination that Pickwick's evidence of financial hardship overwhelmed Leichihman's allegations of age discrimination. Leichihman claims that in making this judgment the court simply substituted its weighing of the evidence for that of the jury. Leichihman concludes that it is "clear there was sufficient evidence to support the jury's verdict." *Id.* at 22.

This argument simply fails to distinguish between the standard for granting a new trial and the standard for judgment n.o.v. In assessing the new trial motion, the judge was no longer required to ignore Pickwick's evidence and give Leichihman the benefit of every favorable inference; he was allowed to weigh the evidence for himself. *See, e.g., Day v. Amax, Inc.*, 701 F.2d 1258, 1262-63 (8th Cir. 1983). Nor was he required to deny the motion simply because there was *sufficient* evidence for the jury to have found in Leichihman's favor. Even when *substantial* evidence supports a verdict, the trial court may conclude that there has been a miscarriage of justice. *See Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 673 (8th Cir. 1985).

The court recognized that the prevention of injustice is the overriding principle in deciding whether to grant a new trial on the ground that the verdict was against the weight of the evidence. *See Leichihman v. Pickwick International, Inc.*, Civ. 3-82-1121, slip op. at 3 (D. Minn. Aug. 15, 1984) (order granting new trial) (citing *Fireman's Fund Ins. Co. v. Aalco Wreck-*

ing Co., 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973), and *Altrichter v. Shell Oil Co.*, 263 F.2d 377 (8th Cir. 1959)). Also, the order accurately describes the parameters of the court's exercise of its discretion in setting aside the jury verdict. The order states that "[t]he court must be motivated by more than the fact that it would have come to a different conclusion had it been the trier of fact. The court must feel that the jury quite clearly reached a seriously erroneous result in spite of the clear weight of the evidence." Slip op. at 4 (citing *Day v. Amax, Inc.*, 701 F.2d 1258 (8th Cir. 1983); *Altrichter*, 263 F.2d at 377).

A district court must also give its reasons for concluding that the verdict is against the great weight of the evidence. *See Stafford v. Neurological Medicine, Inc.*, No. 86-1352, slip op. at 8 (8th Cir. Feb. 11, 1987); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985). In the present case, the court stated:

> The testimony of Pickwick executives and managers about the harsh realities Pickwick faced after the industry-wide recession and the drastic steps that had to be taken to salvage the company made plaintiff's allegations and evidence of age discrimination seem peculiarly subjective and extremely strained. With Pickwick laying off hundreds of employees and divesting itself of entire divisions and affiliated companies, the evidence that personnel decisions affecting plaintiff were motivated by age discrimination was overwhelmed.
>
> We are definitely and firmly convinced that the jury was mistaken in its verdict. The interests of justice as well as the clear weight and logical force of the evidence require a new trial.

Slip op. at 5.

We are satisfied that the district court carefully analyzed the evidence presented in the first trial.

Leichihman asserts, however, that in granting a new trial the district court addressed only one theory of recovery—the reduction-in-force claim—and failed to address his second theory, that Pickwick failed to relocate him to another available position for which he was qualified. We reject this argument.

In considering the sufficiency of the evidence, the court acknowledged that the jury had determined that Pickwick willfully violated the Age Discrimination in Employment Act both in terminating Leichihman and in failing to offer him another position. Slip op. at 2. Thus, the court recognized that two separate claims of discrimination were involved. Then, in discussing the weight of the evidence, the court stated that it agreed with Pickwick's argument that "any evidence supporting plaintiff's *claims* was clearly refuted by Pickwick's evidence of retrenchment and economically motivated personnel decisions." *Id.* at 4 (emphasis added). The court concluded that the verdict was against the weight of the evidence and that a new trial was necessary to avoid a miscarriage of justice. *Id.* The court's further discussion concerning the industry-wide recession relates primarily to the termination issue. Nonetheless, the court ultimately concluded that Pickwick's evidence overwhelmed Leichihman's evidence "that personnel *decisions* affecting plaintiff were motivated by age discrimination." *Id.* at 5 (emphasis added). From the court's consistent use of the plural in describing Leichihman's "claims" and Pickwick's "decisions," we can only conclude that it considered both claims in arriving at its decision.

A motion for new trial is addressed to the judicial discretion of the district court and will not be reversed except for a clear abuse of that discretion. *Syntex Laboratories, Inc.*, 755

F.2d at 673. Having concluded that the district court adhered to the proper legal standard and sufficiently articulated why it arrived at its conclusion, our review of the court's weighing of the evidence is limited. As we cannot conclude the district court abused its discretion, we affirm the grant of a new trial.

II.

Leichihman also appeals from the district court's order granting summary judgment for American Can Company, Pickwick's parent company, on all of Leichihman's claims against it. In his complaint, Leichihman alleges that American Can determines and directs in substantial part the employment policies of Pickwick, and that American Can directed and orchestrated Pickwick's actions in terminating him. American Can moved for summary judgment, arguing that Leichihman had produced no evidence to support his assertion that American Can had any involvement in the decision to terminate Leichihman.

To successfully oppose the motion, it was incumbent upon Leichihman to set forth specific facts showing a genuine issue for trial. *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984); Fed. R. Civ. P. 56(e). Summary judgment is appropriate only if, when viewing the facts in the light most favorable to Leichihman and giving him the benefit of all reasonable factual inferences, there is no genuine issue of material fact, and American Can is entitled to judgment as a matter of law. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356-57 (1986); *Kegel v. Runnels*, 793 F.2d 924, 926 (8th Cir. 1986). We believe that American Can met that standard.

The record shows that the only facts marshalled by Leichihman is that, after American Can acquired Pickwick, American Can changed some of the management and retirement benefit policies that affected Pickwick employees. Leichihman asserts

that from the existence of these policies, a jury could infer that American Can directed Pickwick to get rid of Leichihman. We believe that any such inference would be untenable. There is no evidence linking American Can to any of Pickwick's individual employment decisions, including the decisions to terminate and to refuse to relocate Leichihman. Thus, Leichihman's employment discrimination claim against American Can fails as a matter of law. The district court properly granted summary judgment dismissing American Can as a defendant.

III.

Leichihman next contends that after the second trial the district court erred in denying his motion for a new trial. He contends that two of the jury instructions and several evidentiary rulings were erroneous.

In one of its instructions to the jury, the court set forth as follows the essential elements of Leichihman's claim that he was discriminated against during the reduction-in-force:

> To establish his second claim Mr. Leichihman bears the burden of first establishing that he lost his employment as a result of age discrimination. To do so he must show the following five elements:
>
> 1. That he was between 40 and 70 years old at the time of his termination;
>
> 2. That he was performing his job at a level that met his employer's legitimate expectations;
>
> 3. That despite his performance in his job, he was terminated;
>
> 4. That his job in its various parts continued in existence;
>
> 5. That Mr. Leichihman's age was a determining factor in Pickwick's actions.

Leichihman contends that he should not have been required to prove the fourth element of this charge, "that his job in its various parts continued in existence," and that its inclusion constituted prejudicial error. Relying on our decision in *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161 (8th Cir. 1985), Leichihman asserts that the fourth and fifth elements should have been combined into one to read, "under circumstances from which it can be reasonably concluded that plaintiff's age was a determining factor in defendant's action." We conclude, however, that the district court did not err in giving the instruction under the particular facts of this case.

In *Cova v. Coca Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978), we held that to make a prima facie disparate treatment case the plaintiff must show:

> (1) that he or she is within a protected age group, (2) that he or she met applicable job qualifications, (3) that despite these qualifications, he or she was discharged, and (4) that, *after the discharge the position remained open and the employer continued to seek applications from persons with similar qualifications.*

Cova, 574 F.2d at 959 (emphasis ours); *see Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982).

This particular formulation is based on the guidelines of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussing elements of prima facie case under Title VII, a statute analogous to the Age Discrimination in Employment Act). However, this formulation is not exclusive; because the facts of each age discrimination case will necessarily vary, so will the required prima facie proof. *See Id.* at 802 n.13; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978); *Holley*, 771 F.2d at 1165.

In *McDonnell Douglas*, the facts involved discriminatory hiring and, thus, required proof that there actually was a job opening for which the plaintiff was qualified. 411 U.S. at 802. This showing indicates that the employer had a continuing need for the plaintiff's services and skills, thereby creating the inference that the employer based its decision on an impermissible consideration. *See Loeb v. Textron*, 600 F.2d 1003, 1013 & n.11 (1st Cir. 1979) (in an analogous discriminatory firing case, plaintiff must show that employer sought a younger replacement, thereby demonstrating a continuing need for plaintiff's services); *cf. Furnco*, 438 U.S. at 577. In *Cova* and *Tribble, supra*, we included that same requirement. Although those two cases ostensibly involved reductions-in-force, the plaintiff in each case alleged that, after being discharged, the employer hired younger replacements to fill the same or similar position. Thus, the requirements that the position remained open and the employer continued to seek applications fit the factual circumstances involved.

In choosing an appropriate framework for a prima facie case in a particular factual context, it must be remembered that the ultimate issue in a disparate treatment case is whether the employer intentionally discriminated against the plaintiff. *See United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 715 (1983). Thus, any modification of the prima facie case described in *McDonnell Douglas* must still require the plaintiff to create an inference of a discriminatory reason for his termination.

In the present reduction-in-force situation, the court adapted the required prima facie elements to fit the particular factual controversy. Leichihman's position throughout has been that, during Pickwick's reorganization, his responsibil-

ities were given to younger, less experienced employees.[4] Thus, his case was founded on the allegation that Pickwick fired him while retaining a younger employee to perform Leichihman's duties.[5] At trial, Pickwick strongly disputed this allega-

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[4] Leichihman alleged this in his complaint, Supp. App. at 278, 279-80; his trial memorandum, Supp. App. at 298; his opposition to Pickwick's motion for summary judgment, Supp. App. at 363, 367; and his brief to this court, Appellant's Brief at 8. Leichihman also requested a jury instruction in which one of the elements of his prima facie case would be "[t]hat the defendant assigned duties to a younger person that the plaintiff previously performed." Supp. App. at 404.

[5] Much of the confusion in this case arises because Leichihman also attempted to proceed under a disparate impact theory to support his reduction-in-force claim. He asserts that, under this different theory, whether his job function continued to exist has nothing to do with his claim. However, a disparate impact analysis is simply inapplicable here.

Unlike a disparate treatment case, under a disparate impact theory the plaintiff is not required to show discriminatory animus in his prima facie case, but instead must show only that a facially neutral employment policy operates as a "built-in headwind[]" against older employees. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The reduction-in-force at Pickwick was not implemented through some facially neutral procedure, such as a height and weight requirement or an aptitude test, but was conducted through a series of subjective decisions eliminating certain positions in order to cut costs. There existed no neutral policy, the impact of which could be measured. Thus, a disparate impact model provides an inappropriate vehicle for analysis. *See Talley v. United States Postal Serv.*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984); *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) (per curiam). Indeed, Leichihman acknowledges as much when he asserts that an appropriate instruction would still require the plaintiff to show that age was a "determining factor" in the termination decision.

In addition, each of the cases Leichihman cites for support analyzes reductions-in-force and company reorganizations as disparate treatment cases. *See Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161 (8th Cir. 1985); *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1094 (5th Cir. 1981); *LaGrant v. Gulf & W. Mfg. Co.*, 748 F.2d 1087,

tion, asserting that Leichihman's duties were not redistributed, but simply eliminated as a result of the economic downturn. Thus, unlike the circumstances in *Cova* and *Tribble*, Leichihman never contended that Pickwick hired a younger person to replace him. Instead, he contends that when his position was eliminated, his duties went to a younger employee.

By including the requirement that his job function continued to exist as an element of Leichihman's prima facie case, the district court was simply following the conceptual underpinnings of *McDonnell Douglas*. A prima facie case, although a minimal showing, at least requires the plaintiff to show that the employer's actions were more likely than not based on a consideration of impermissible factors. *See Furnco*, 438 U.S. at 577; *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 290 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983). In a reduction-in-force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated; it is readily explained by the employer's economic hardship and the decrease in business. If Leichihman cannot show that Pickwick had some continuing need for his skills and services in that his various duties were still being performed, then the basis of his claim collapses.

Nothing in *Holley, supra*, specifically eliminates this element of a prima facie case. In *Holley*, we agreed with the Sixth Circuit that the ADEA does not create "automatic presumptions" against an employer whenever an older worker

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1090-91 (6th Cir. 1984) (plaintiff must produce evidence from which factfinder can reasonably conclude that the employee intended to discriminate). We believe that Leichihman simply confused the use of statistics to show disparate impact with their use to create an inference of discriminatory action in a disparate treatment case.

is replaced by a younger one. 771 F.2d at 1166 (quoting *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 n.4 (6th Cir. 1975)). Thus, we determined that when the basis of the plaintiff's case rests on the employer's decision, during an economic downturn, to consolidate the plaintiff's position and that of a younger employee, the plaintiff must make some additional showing that age was a determining factor in his termination. *See id.* at 1165-66. The fifth element of the present instruction correctly expresses this requirement.

In *Holley*, we also recognized the full import of the Court's admonition in *McDonnell Douglas* that the requirements of the prima facie case must be tailored to the facts. We did not discuss whether the position's continued existence was a necessary element. It is possible that in some circumstances the showing that age was a determining factor in the employer's action will be sufficient, and the plaintiff need not show that his position continued to exist. However, in light of our holdings in *Cova* and *Tribble* and the position taken by Leichihman regarding the factual circumstances giving rise to his claim, we cannot conclude that the district court erred in instructing the jury in this respect.

B.

Leichihman further objects to the following jury instruction given by the court:

> A single spoken statement referring to age, standing alone, does not necessarily prove an intent to discriminate. Such statement, if you believe it occurred, is like any other evidence and you may consider it or reject it in light of all of the facts as you find those facts to be.

We find no error in this cautionary instruction. First, it accurately states the law. *Cf. Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (derogatory

comments by supervisor not excessive and opprobrious, but mere casual conversation did not rise to level of Title VII violation); *Morales v. Dain, Kalman & Quail, Inc.*, 467 F. Supp. 1031 (D. Minn. 1979) (isolated comments not sufficient to show discriminatory animus in termination decision). Moreover, by including language that a single statement does not "necessarily" prove intent, and in cautioning the jury to examine it "in light of all the facts," the district court's instruction gave the jury the option of finding that, in the context of this case, the statement *was* sufficient evidence of discriminatory intent.

Second, it was tailored to the facts. It refers to the statement Ed Erdmann allegedly made to Joy Harris that she should "go through the motions" of interviewing an "older man" for an available position. Leichihman argues that it inaccurately refers to a "single" statement even though Erdmann had made other remarks concerning age. The transcript shows, however, that Erdmann's only other statement regarding age was his one comment to Ms. Harris that he didn't know that she was twenty years older than him. We cannot conclude that this charge misled the jury.[6]

C.

We have thoroughly examined Leichihman's remaining claims of error as to the district court's evidentiary rulings during the second trial. Finding no abuse of discretion, we affirm.

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[6] Leichihman's contention that the clause "if you believe it occurred" improperly implied that Harris was lying is meritless. The court was simply indicating to the jury that it was not required to accept the testimony of any witness, even if that testimony was unrefuted.

The district court judgment is affirmed in all respects.

A true copy.

Attest:

ROBERT D. ST. VRAIN

Clerk, U. S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-85-1171

MONY LEICHIHMAN

v.

PICKWICK INTERNATIONAL, INC.

ORDER

This matter is before the Court on plaintiff's motion to reinstate the judgment rendered by Judge Edward J. Devitt on May 14, 1984 which was subsequently vacated on June 7, 1984. Plaintiff also seeks to vacate the order issued by Judge Devitt on August 15, 1984 granting a new trial in this matter. In the alternative, plaintiff moves for an order vacating the judgment entered in this matter on January 3, 1986 and granting plaintiff a new trial. Based upon the files records, briefs and arguments of counsel, and all other matters relating to this case, IT IS ORDERED that:

1. Plaintiff's motion to reinstate the judgment entered in the above-captioned case on May 14, 1984 is denied.

2. Plaintiff's motion to vacate the August 15, 1984 order granting a new trial in the above-captioned case is denied.

3. Plaintiff's motions to vacate the judgment entered on January 3, 1986 in the above-captioned case and to grant plaintiff a new trial are denied.

Dated: March 4, 1986.

JAMES M. ROSENBAUM
United States District Judge

Filed Mar. 4, 1986.

UNITED STATES DISTRICT COURT
MINNESOTA—FOURTH DIVISION
No. 4-85 Civil 1171

MONY LEICHIHMAN
v.
PICKWICK INTERNATIONAL AND
AMERICAN CAN COMPANY

James R. Rosenbaum, Judge

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in favor of defendants and against plaintiff. Defendants' costs of action to be taxed.

FRANCIS E. DOSAL
Clerk
(By) CYNTHIA FRANCIS
Deputy Clerk
JAMES R. ROSENBAUM
Judge, United States
District Court

Date: Jan. 3, 1986.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. 3-82-1121

MONY LEICHIHMAN,

Plaintiff,

v.

PICKWICK INTERNATIONAL, INC.,

Defendant.

MEMORANDUM & ORDER

Steve Refsell, Doherty, Rumble & Butler, Minneapolis, Minnesota, and Marcus R. Magnuson, James F. Dunn & Associates, St. Paul, Minnesota, attorneys for plaintiff.

Jon P. Parrington and Joel Muscoplat, Pustorino & Pederson, Edina, Minnesota, attorneys for defendant.

Before the court is defendant Pickwick's motion for judgment notwithstanding the verdict or, in the alternative, for new trial. The standard for granting a motion for judgment notwithstanding the verdict is a high one. The court is merely to decide the legal question whether there was evidence sufficient to create material fact issues for the jury. The court cannot decide those fact issues if they are found to exist. *Lane v. Chowning*, 610 F.2d 1385, 1388 (8th Cir. 1980). If there is evidence of substance upon which the jury could properly or reasonably have found the verdict for the nonmovant, judgment notwithstanding the verdict cannot be granted. *McGee v. South Pemscot School District*, 712 F.2d 339 (8th Cir. 1983); *Voegeli v. Lewis*, 568 F.2d 89, 92 (8th Cir. 1977). In considering the sufficiency of the evidence in support of the verdict,

the court is not free to weigh the evidence or pass on the credibility of witnesses or substitute its judgment of the facts for that of the jury. *Singer Co. v. E.I. du Pont de Nemours & Co.*, 579 F.2d 433 (8th Cir. 1978); 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2524, at 543-44. The court must view the evidence in the light most favorable to the nonmovant and must give the nonmovant the benefit of all reasonable inferences. *Dace v. AFC Industries, Inc.*, 722 F.2d 374 (8th Cir. 1983); *Brown v. Missouri Pacific R.R.*, 703 F.2d 1050 (8th Cir. 1983). The nonmovant is not entitled to the benefit of unreasonable inferences or those at war with the undisputed facts. *Marcoux v. Van Wyk*, 572 F.2d 651 (8th Cir. 1978). Some courts have said that judgment notwithstanding the verdict must be granted unless there is substantial evidence in opposition to it. *See, e.g., Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 1084 (7th Cir. 1970).

In this case the jury found that Pickwick terminated plaintiff due to age discrimination, that Pickwick failed to offer plaintiff an opportunity for another position due to age discrimination, and that such discrimination was a willful violation of the ADEA. In support of its motion for judgment notwithstanding the verdict, Pickwick argues that there was no evidence supporting plaintiff's arguments that age discrimination was the reason plaintiff was assigned to retail after the split, that age discrimination was the reason plaintiff's job in retail was later eliminated, or that age discrimination was the reason plaintiff did not obtain a new position.

Measured against the standard for judgment notwithstanding the verdict described above, Pickwick's position just is not tenable. Although most if not all of plaintiff's evidence was circumstantial, plaintiff is entitled to every favorable inference. Plaintiff's assignment to retail after the split, the

fact that older more senior employees cost more in terms of salary and benefits than newer, younger employees, the testimony of Jay Harris, the existence of Pickwick's employee relocation policy and the discordant testimony of Pickwick employees about the date and substance of plaintiff's last meeting with his superiors are some of the evidence upon which the jury could have rested its verdict. Simply because Pickwick infers economic motive from plaintiff's evidence does not mean it was unreasonable for the jury to infer a discriminatory motive. It cannot be said that plaintiff's evidence did not create issues of material fact. Even though Pickwick's evidence of drastic cost-cutting measures implemented during the pertinent time period was substantial, in a motion for judgment notwithstanding the verdict we cannot weigh the evidence or assess the credibility of witnesses who gave controverted testimony. Pickwick's motion for judgment notwithstanding the verdict cannot be granted.

A motion for new trial is addressed to the sound discretion of the trial court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Lane v. Chowning*, 610 F.2d 1385, 1388 (8th Cir. 1979). The overriding principle that should guide the court in considering a motion for new trial is the prevention of injustice. *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972); *Altrichter v. Shell Oil Co.*, 263 F.2d 377 (8th Cir. 1959). If the jury verdict is against the weight of the evidence, or if it is the result of some prejudicial error of law (i.e., an error causing substantial harm to the losing party), then a new trial is justified. *See Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 359 (8th Cir. 1973). The court has broad discretion in considering the weight of the evidence. The trial judge is free to weigh the evidence for himself and if he is left with the definite and firm conviction that the jury has made a mistake, he may set aside the verdict even though there is

substantial evidence to support it. The court is not required to view the evidence in the light most favorable to the nonmovant. The court must be motivated by more than the fact that it would have come to a different conclusion had it been the trier of fact. The court must feel that the jury quite clearly reached a seriously erroneous result in spite of the clear weight of the evidence. *See generally, Day v. Amax, Inc.*, 701 F.2d 1258 (8th Cir. 1983); *Altrichter v. Shell Oil Co.*, 263 F.2d 377 (8th Cir. 1959); 11 C. Wright & A. Miller, *supra*, §§ 2803, 2805-06.

Pickwick argues that any evidence supporting plaintiff's claims was clearly refuted by Pickwick's evidence of retrenchment and economically motivated personnel decisions. Pickwick attributes the verdict to the jury's sympathy for plaintiff's life experiences. We agree that the verdict was against the weight of the evidence and that a new trial is necessary to avoid a miscarriage of justice.

The testimony of Pickwick executives and managers about the harsh realities Pickwick faced after the industry-wide recession and the drastic steps that had to be taken to salvage the company made plaintiff's allegations and evidence of age discrimination seem peculiarly subjective and extremely strained. With Pickwick laying off hundreds of employees and divesting itself of entire divisions and affiliated companies, the evidence that personnel decisions affecting plaintiff were motivated by age discrimination was overwhelmed.

We are definitely and firmly convinced that the jury was mistaken in its verdict. The interests of justice as well as the clear weight and logical force of the evidence require a new trial.[1]

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[1] Because we find that the interests of justice and the weight of the evidence warrant a new trial, we do not consider the various prejudicial errors alleged by Pickwick as additional support for its motion for new trial.

Accordingly, Pickwick's motion for judgment notwithstanding the verdict is DENIED. The alternative motion for new trial is GRANTED.

Dated: August 15, 1984.

EDWARD J. DEVITT
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-82-1121

MONY LEICHIHMAN,

Plaintiff,

vs.

PICKWICK INTERNATIONAL, INC.,

Defendant.

ORDER

The above-entitled matter came on for consideration on the 7th day of June, 1984 before The Honorable Edward J. Devitt on a joint Motion by Plaintiff and Defendant, pursuant to Rule 60, Federal Rules of Civil Procedure, for an Order vacating Judgment entered in this matter on or about May 9, 1984.

Upon all the records, files and proceedings herein, the Memorandum of Points and Authorities submitted by the parties and the Court being fully advised in the matter,

IT IS HEREBY ORDERED:

1. That the joint Motion of Plaintiff and Defendant is in all respects hereby granted.

2. That the Judgment entered by the United States District Court's Clerk's office in the above-mentioned matter dated

May 9, 1984, a copy of which is attached to this Order as exhibit "A", is hereby fully vacated.

Dated: June 7, 1984.

BY THE COURT:
EDWARD J. DEVITT
Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

No. 3-82-1121

LEICHIHMAN
v.
PICKWICK INT'L
AMERICAN CAN COMPANY

JUDGMENT IN A CIVIL CASE

Judge Edward J. Devitt.

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that plaintiff was discriminated against on the basis of age in his discharge; plaintiff was discriminated against on the basis of age in not being given an opportunity for a new position; such discrimination was willful; plaintiff's damages are $60,000.

IT IS SO ORDERED:

EDWARD J. DEVITT
Senior Judge

Date: May 14, 1984.

ROBERT E. HESS
Clerk
(By) MARY E. HERNANDEZ
Deputy Clerk

Date: May 9, 1984.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. No. 3-82-1121

MONY LEICHIHMAN,

Plaintiff,

vs.

PICKWICK INTERNATIONAL,

Defendant.

SPECIAL VERDICT

Answer each of the following questions according to the instructions given to you. Your answer to each question must be unanimous.

1. Was plaintiff terminated by defendant due to age discrimination?

Answer "Yes" or "No." Yes

2. Did defendant fail to offer plaintiff an opportunity for another position due to age discrimination?

Answer "Yes" or "No." Yes

3. If you answered "yes" to question No. 1 or No. 2, was such discrimination willful?

Answer "Yes" or "No." Yes

4. If you answered "yes" to question No. 1 or No. 2, then answer the following question: Did plaintiff become disabled as a result of age discrimination by defendant Pickwick?

Answer "Yes" or "No." Yes

5. If you answered "no" to No. 4, answer the following question: What is the amount plaintiff lost in wages and fringe benefits from the date of his termination until the date of his disability?

$\$$————

6. If you answered "yes" to No. 4, what is the amount plaintiff lost in wages and fringe benefits from the date of his termination until the date of his trial?

$60,000

Dated: May 9, 1984.

J. LYNN PEARSON
Foreperson

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

#3-82-1121

MONY LEICHIHMAN

v.

PICKWICK INTERNATIONAL AND
AMERICAN CAN COMPANY

JUDGMENT IN A CIVIL CASE

Devitt, J.

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motions are in all respects granted; that defendant American Can is granted summary judgment on all of plaintiff's claims against it; that defendants are granted summary judgment on all claims of retaliatory discharge from employment made against them; and that defendants are granted summary judgment on Count VI of plaintiff's complaint and all claims of detrimental reliance made against them.

ROBERT E. HESS
Clerk
(By) JILL GUNDERSEN
Deputy Clerk

Date: 8-17-83

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No: 3-82-1121

MONY LEICHIHMAN,

Plaintiff,

vs.

PICKWICK INTERNATIONAL AND AMERICAN CAN COMPANY,

Defendants.

ORDER

The above-entitled matter came on for hearing on the 15th day of August, 1983 before The Honorable Edward J. Devitt on a Motion by Defendants for an Order, (1) Dismissing or granting Summary Judgment on all of Plaintiff's claims against Defendant American Can Company, (2) Dismissing

or granting Partial Summary Judgment on Plaintiff's claims of retaliatory discharge from employment against both Defendants, and (3) Dismissing or granting Partial Summary Judgment on Plaintiff's claims of detrimental reliance against both Defendants as contained in Count VI of Plaintiff's Complaint.

Upon all the records, files and proceedings herein, the Memoranda of Points and Authorities submitted by the parties, the arguments of counsel and the Court being fully advised in the matter:

IT IS HEREBY ORDERED:

1. That the Motions of Defendants are in all respects hereby granted.

2. That Defendant American Can is hereby granted Summary Judgment on all of Plaintiff's claims against it.

3. That Defendants are granted Summary Judgment on all claims of retaliatory discharge from employment made against them.

4. That Defendants are granted Summary Judgment on Count VI of Plaintiff's Complaint and all claims of detrimental reliance made against them.

LET JUDGMENT IN FAVOR OF DEFENDANTS BE ENTERED ACCORDINGLY.

Dated: August 17, 1983

BY THE COURT:
EDWARD J. DEVITT
Judge of United States
District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5150-MN

MONY LEICHIHMAN,

Appellant,

v.

PICKWICK INTERNATIONAL AND
AMERICAN CAN COMPANY,

Appellees.

APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF OF APPELLANT MONY LEICHIHMAN

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* * * * *

In addition, the trial court's order and memorandum acknowledged that there was "discordant" testimony given by some of Pickwick's witnesses and it is clear from the transcript of the first trial that the credibility of Leichihman and his witnesses on the one hand vis-a-vis that of Irvin, Jacksich, Moran, Beightol and Sackett, on the other were extremely important to the determination liability on plaintiff's termination claim. In the recent decision in *Goldsmith*, supra, this court reversed the decision of a trial court that the weight of the evidence at a first trial did not support the verdict rendered in favor of plaintiff. In doing so this court stated:

> "The choice between the two stories was essentially a credibility determination for a jury rather than a weight of evidence issue. See *McGee v. South Penniscot School Dist. R-V*, 712 F.2d 339, 344 (8th Cir. 1983). These cir-

> cumstances, in our view, undermine the court's action in granting a new trial on the ground that a finding that the draft was payable was against the weight of the evidence."

Similarly, in the present case the major issues involved were ones of witness credibility, not weight of the evidence, thus this court should also reverse the order of the first trial court regarding the granting of a new trial.

* * * * *

Supreme Court, U.S.
FILED
SEP 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 87-232

IN THE

Supreme Court of the United States

October Term, 1987

MONY LEICHIHMAN,

Petitioner,

vs.

PICKWICK INTERNATIONAL, INC., AND AMERICAN CAN COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent Pickwick International, Inc.

1987—EXECUTEAM/LAW LINES DIV., 93 W Little Canada Rd., St. Paul, MN 55117—(612) 483-8793 • 800-328-8322 Ext. 476

QUESTIONS PRESENTED

I. May a trial court grant a new trial on the grounds that the jury verdict is against the weight of the evidence in a case in which the issues are not simple and the trial court has not specifically disregarded the jury's assessment of the credibility of the witnesses.

The Court of Appeals ruled in the affirmative.

II. May a trial court grant a new trial on the grounds that the verdict is against the weight of evidence when the trial court bases its ruling on the evidence.

The Court of Appeals ruled in the affirmative.

LIST OF PARTIES AND AFFILIATES

Petitioner: Petitioner Mr. Mony Leichihman is an individual.

Respondent was formerly known as Pickwick International, Inc. and is now correctly known as The Musicland Group, Inc., a publicly held corporation. The majority of The Musicland Group, Inc. stock is held by the former American Can Company which recently changed its name to Primerica Corporation.

Although Petitioner has named American Can Company as a Respondent, the trial court granted American Can Company's motion for summary judgment by Order dated August 17, 1983 and judgment was entered thereon in favor of American Can Company. No issues pertaining to American Can Company have been raised in Mr. Leichihman's petition.

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CASE NO. 87-232

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MONY LEICHIHMAN,

Petitioner,

vs.

PICKWICK INTERNATIONAL, INC., AND AMERICAN CAN COMPANY,

RespondentS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 814 F.2d 1263 (8th Cir. 1987). The August 15, 1984 Memorandum and Order of the District Court for the District of Minnesota is reported at 589 F.Supp. 831 (D.Minn. 1984). Both opinions are included in Petitioner's Appendix.

STATEMENT OF THE CASE

Pickwick International, Inc. is now primarily known for its operation of the "Musicland" chain of record stores,[1] although at one time it had many divisions and affiliated companies, including, Pickwick Distribution (sales of records and tapes to non-owned music stores); Pickwick Rack (operation of record departments in discount and department stores); Pickwick Great Britain; Keel Manufacturing Co. (record pressing and manufacturing); Disc Graphics (record jacket printing and manufacturing); and other operations. In addition, Pickwick once operated up to 18 record warehouses across the country for shipping and receiving. In the 1970's the number of "Musicland"stores increased dramatically and the number of Pickwick employees in all divisions jumped into the several thousand range. Pickwick's growth during this period was phenomenal, and was fueled by a "charged" record buying atmosphere and the enormous success of several rock and pop musical groups. In 1977, American Can Company purchased all of Pickwick's stock and it became a wholly owned subsidiary of American Can Company.

In the late 1970's, in contrast to the earlier years, the record industry in general and Pickwick in particular began to lose vast amounts of money and suffered enormous financial setbacks due to a recession and a down-turn in the record industry. In the period from the late 1970's through the time of Petitioner's termination in 1981, Pickwick lost huge sums of money and in one period of approximately a year and a half, went from profits of many millions of dollars to a net loss of nearly $100,000,000.

Because Pickwick was a highly integrated company operating businesses in retail, wholesale, manufacturing and distribution, all running through one central management, purchasing and

[1]For purposes of clarity, the Respondent will be referred to herein as Pickwick.

accounting department, it was extremely difficult to determine where the company was losing money and where it was making money. To find the answers to these questions, it was decided to make each aspect of the company financially accountable, and in order to do so, management decided to split Pickwick into two totally independent companies with separate management and direction and operating from different locations. One company would operate the retail stores and the other would take over all Rack and Distribution functions. The two companies would be known as "The Musicland Group" and "Pickwick Rack". The financial situation was so desperate during this period, that the company also sold or closed Pickwick Great Britian, Keel Manufacturing Co., Disc Graphics and Pickwick Records and almost all of the warehouses. Hundreds of people were terminated across the country as each division was sold or closed. In addition, there were several mass layoffs in the home office which came to be known as "Black Fridays".

Petitioner was hired by Pickwick in 1966 and worked in the record return department in the Minneapolis warehouse. In 1978 he assumed the position of Returns Quality Control Manager. In Petitioner's early years, the company had a large returns department as the millions of unsold records returned to Pickwick each year from its customers were counted one-by-one by hand. As Returns Quality Control Manager, Petitioner would oversee the paperwork generated by the returns process and oversee the documents for completeness and accuracy. If there were discrepancies, he would track down the returns and try to find the errors. Once he was satisfied with the documents, he would transfer them to the credit adjustment department which would then issue a credit memo to the customer.

By 1981, a number of factors came into play which ultimately made Petitioner's position unnecessary. Until approximately 1980, all record manufacturers had had a policy of allowing 100% returns of unsold records from their distributors such as

Pickwick and Pickwick similarly accepted 100% returns from its customers. In 1980, however, the record manufacturers severely cut down on the number of records which could be returned and, accordingly, Pickwick cut down on the number of returns it would accept. This change in policy significantly reduced the number of records Petitioner's department had to process and also reduced the number of people working in returns. In addition, Pickwick conducted studies which showed that, over the long run, it was not necessary to count returned product as there was very little, if any, discrepancy between the amount of credit claimed by Pickwick's customers and the actual value of the returned product so that it was not worth the time and expense of counting returns or examining the paperwork. Additionally, the recession and down-turn of the record business in general substantially reduced the number of records coming back to the warehouse.

As part of the planning to implement the reorganization mentioned above, it was decided that the new Pickwick Rack would streamline its records return department and would not count records or analyze the paperwork, but would merely send the credit request forms to the credit adjustment department, although occasionally they would make a random check to verify that the claimed credits were within a tolerable range. Once this decision was made, there was no need for someone to do peitioners work in the new Rack company and when the split was made he was assigned to The Musicland Group.

In 1981, the company was still in difficult financial condition and several companywide task forces were set up to identify areas of potential cost reduction. In the spring of 1981, following an investigation which lasted several months, one task force recommended, among other things the elimination of several jobs including Petitioner's. The task force had recognized that due to the decrease in the number of returns, the use of spot checking rather than hand counting, automation already in

place and anticipated computerization of returns, Petitioner's position was no longer necessary. At trial, Petitioner readily agreed that his position in The Musicland Group's returns department was no longer necessary and he could not quarrel with the decision to eliminate his function. Although hundreds of people had lost their jobs in the bad times and the lay-offs, Petitioner's position went untouched until the spring of 1981 when the task force determined that his job was no longer necessary.

Petitioner commenced this action alleging multiple claims for relief including (1) federal age, national origin and religious discrimination, (2) state age, national origin and religious discremination, (3) breach of contract, (4) conspiracy, (5) retaliatory discharge and (6) tortious interference with contract, against both Pickwick and American Can Company. Discovery lasted over 18 months and resulted in the production of thousands of documents. Depositions were taken of 20 witnesses and Petitioner's own deposition took place over the course of several days and was close to one thousand pages. Petitioner not only claimed that Pickwick committed all of the alleged illegal acts relating to his termination in 1981, but also claimed discriminatory acts over a three to five year period including his promotion to Returns Quality Control Manager and his belief that Pickwick's executives were corrupt, dishonest and incompetent and that they conspired against him because he "knew too much".

Even after American Can Company and Pickwick were successful in obtaining partial summary judgements, Petitioner persisted in claiming national origin and religious discrimination until the very first day of trial when he voluntarily dismissed these claims, even though a significant part of pretrial discovery had been devoted to defending these allegations.

Trial lasted almost two weeks and over a dozen witnesses testified on all aspects of the case, including expert testimony on

statistics, labor, employment, medicine and psychiatry. A significant portion of the trial was devoted to the science of statistics and probability theory with special emphasis on mathematical models. A great deal of testimony was also devoted to the manipulation of several years of Pickwick's employment data to obtain both "chi-square"and "standard deviation" comparisons of the average age of Pickwick's work force with the national labor force. This portion of the trial was particularly complex and detailed and of the type not readily comprehended by laymen.

Not only was the trial unusual because of the complexity of the facts and issues in litigation, as well as the expert statistics testimony, but also because of Petitioner's flagrant attempts to manipulate jury sympathy in his favor and against Pickwick. Early on in the trial Petitioner was permitted to testify as to aspects of his life which were not the slightest bit relevant to the issues and clearly intended solely to elicit jury sympathy. For example, Petitioner testified in detail about the hardships of growing up in Romania, his capture by the Nazis during World War II and life in a concentration camp. He testified that he was forced to dig graves for fellow prisoners, and that although he too had been scheduled for extermination, he managed to escape. The jury heard about his returning to post-war Romania and struggling to overcome official anti-Semitism and finally immigrating to the United States with a wife and daughter, unable to speak English and without a job. It was clear that this evidence was offered only to touch the hearts of the jury and gain the jury's sympathy.

Near the end ot the trial Petitioner again sought the jury's sympathy while at the same time turning the jury against Pickwick by "proving" that David Irvin of Pickwick's Human Resources Department had lied. Irvin had testified that once he became aware consideration was being given to eliminating Petitioner's position, he double checked the decision and

started a company-wide search for another job for which Petitioner might be qualified. He later became aware of an operations analyst position and was going to tell Petitioner about it when he had to tell him his position was being eliminated. Irvin was adamant that he told Petitioner about the opportunity to interview, however, Petitioner was just as adamant that he did not.

After Irvin's testimony to "prove" that Irvin could not have told him, Petitioner, with no prior notice to Pickwick, took the stand and produced several photographs and long distance telephone bills which he testified showed he was on vacation the week Irvin claimed he told him of the analyst position, thus proving Pickwick's witness had lied. Everyone in the courtroom, particularly Pickwick's counsel, was dumbstruck by Petitioner's revelation as throughout the many months of discovery and production of documents, even though Petitioner had always maintained that Irvin had not told him of the interview, he had never disclosed any documents to support his denial. In his closing argument Petitioner's counsel made repeated reference to the vacation photographs and telephone bills and made numerous references to the "sham" job offer. This testimony had an obvious effect on the jury's sympathy for Petitioner and clearly turned the jury against Pickwick.

As adamant as Petitioner was at the first trial that he had been on vacation, at the commencement of the second trial when Petitioner took the stand as the very first witness, having been made aware that Pickwick had checked his payroll records, he *recanted* and admitted that the testimony which he had been so sure of at the first trial was wrong — that he was indeed at work that week and that he had been mistaken about the photos and the telephone bills. Unfortunately the first jury never got to hear this admission because it had long since rendered its verdict.

REASONS FOR DENYING THE WRIT

QUESTION I

Petitioner asserts there is a split among the circuits on the standard for granting a new trial based on the weight of the evidence when the subject matter in litigation is "simple" and the trial court disagrees with the jury's assessment of the "credibility of witnesses", i.e. in some circuits it is an abuse of discretion to grant a new trial in such circumstances while in others it is not.

Petitioner's argument is flawed in that the Eighth Circuit has essentially recognized the new trial standard which Petitioner would have this Court adopt and thus any split among the circuits would have no effect on this case. Additionally, even if there is split, the split has no bearing here because (1) the subject matter of this litigation was not "simple" and the issues were not the type which depended on the "credibility" of the witnesses and (2) there was no indication that the court's assessment of the credibility of the witnesses played any role in granting a new trial.

A. The alleged split in the standard to be used in awarding a new trial on the weight of the evidence is irrelevant as the Eighth Circuit has essentially recognized the standard recommended by Petitioner.

Petitioner has claimed that in those circuits which have adopted *Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir. 1960), cert. denied 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2nd 60 (1960), it is an abuse of discretion to award a new trial on the weight of the evidence "where the subject matter of the litigation is simple" and "the determination of the issues depends upon the veracity of the witnesses". (Pet. 13, 14)

Petitioner has cited several Eighth Circuit cases to

demonstrate that a trial court may weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict, contrary to the *Lind* standard. (Pet. 17). What Petitioner has overlooked, however, is that in *Fireman's Fund Insurance Co. v. AALCO Wrecking Co.*, 466 F.2d 179 (8th Cir. 1972), cert. denied, 410 U.S. 930, 93 S.Ct. 1371, 35 L.Ed.2d 592 (1973), the Eighth Circuit specifically referred to *Lind* and acknowledged that if the subject matter of the litigation is simple the trial court should be reluctant to grant a new trial and that the appellate court should exercise a closer degree of scrutiny and supervision to protect the litigant's right to a jury trial. *Fireman's Fund Insurance Co.*, 466 F2d at 187. This is exactly what *Lind* stands for.

Additionally, in *McGee v. South Pemiscot School Dist. R-V,* 712 F.2d 339 (8th Cir. 1983), the Eighth Circuit not only reiterated that the trial court should be "particularly reluctant to grant a new trial" where the subject matter of litigation is simple but also noted that "[t]he *jury* weighs the evidence and credibility of the witnesses." *McGee,* 712 F.2d at 344. (Emphasis added.) It is thus clear that in the Eighth Circuit if the subject matter of the litigation is "simple" the trial court should be particularly reluctant to grant a new trial and it is the jury's province to weigh the evidence and the credibility of the witnesses. This appears to be the new trial standard Petitioner would have this Court adopt on certiorari.

While it is true that in other Eighth Circuit cases the trial court has been permitted to weigh the evidence and disbelieve the witnesses, *Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385, 387 (8th Cir. 1984) and *Brown v. Syntex Laboratories, Inc.*, 755 F.2d 668, 673 (8th Cir. 1985), in these cases there was no statement regarding the subject matter of the litigation. Respondent submits that in the appropriate case the Eighth Circuit recognizes the new trial standard proposed by Petitioner and thus the split would have no bearing on the outcome of this case.

B. The alleged "split" has no bearing on this case because the subject matter of the litigation was not "simple" and the determination of the issues did not depend on the "credibility" of the witnesses.

Petitioner has claimed that in the circuits which have adopted *Lind*, it is an abuse of discretion to award a new trial on the weight of the evidence where the subject matter of the litigation is simple and the determination of the issues depends upon the veracity of the witnesses and cites the Second Circuit as rejecting the *Lind* analysis, thus creating a "split". *Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1048 (2nd Cir. 1984).

Respondent submits that if such an alleged split exists it is not relevant here because the subject matter of this case was far from "simple" and resolution of the issues depended upon much more than just the "veracity of the witnesses".

A review of *Lind* and some of the cases cited by Petitioner demonstrates the type of "simple" case to which the *Lind* standard should apply. In *Lind* itself, for example, plaintiff merely sued for unpaid commissions and moving expenses and the issues came down to the terms of the commission program, with some witnesses testifying in favor of plaintiff and some against. The trial court awarded the defendant a new trial and the Third Circuit reversed the order as an abuse of discretion. The Court specifically noted that the subject matter in *Lind* was simple, easily comprehended by laymen and that the jury's main duty was to determine the veracity of the witnesses. *Lind*, 278 F.2d at 91. It also went on to state, however, that where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of juries, a different standard of review would apply. *Lind*, 278 F.2d at 90.

In *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881 (1st Cir. 1978) the plaintiff claimed he was injured aboard ship and brought an action under the Jones Act, 46 U.S.C. §688. The evidence of injury was disputed and the trial court granted the

defendant a new trial. On appeal, the First Circuit cited *Lind* and instructed the trial court to reconsider the motion, although it could not say if either granting or denying a new trial would be an abuse of discretion. Injury cases, such as *Borras* are clearly the type which fall within the "simple" category and in which the credibility of the witnesses plays a key role.

In *Vander Zee v. Karabatsos*, 589 F.2d 723, (D.C.Cir. 1978), cert. denied 441 U.S. 962, 99 S.Ct. 2407, 60 L.Ed.2d 1066 (1979), the District of Columbia Circuit reversed an order granting a new trial in an oral contract case. This too was a case in which the issues were simple and the result largely dependent on the credibility of the witnesses. The *Lind* standard obviously applies to a case like this.

It is clear that the new trial standard upon which the split is allegedly based does not apply to this case. Here the trial dealt with not one but many complicated matters outside the ordinary knowledge of juries and did not involve just a simple issue as in the typical *Lind* case. Discovery in this case produced many thousands of pages of documents and deposition testimony and almost as many at trail. The jury was presented with expert testimony on statistics, labor, psychiatry and medicine as well as business and economic testimony on the problems of a national corporation going through tremendous financial setbacks, layoffs and finally a reorganization. To claim that this was "a case in which the issues were simple" (Petitioner's Argument I) is simply not accurate and at a minimum mischarcterizes the complexitity of this litigation. Petitioner's attempt to describe this case as "simple" is nothing more than an obvious attempt to fit within the *Lind* standard in hopes that the Court would consider certiorari. This attempt should be rejected.

C. The alleged split has no bearing on this case because the trial court did not substitute its judgement of the facts and credibility of the witnesses for that of the jury.

Petitioner asserts there is a split as to whether the trial court may substitute its judgement of the facts and credibility of the witnesses for that of the jury in ruling on a motion for a new trial. (Pet. 13).

Pickwick submits that even if such a split exists, it has no relevance here because the trial court did not consider the credibility of the witnesses or substitute its judgement of the facts in granting the new trial. More specifically, a review of the trial court's opinion, gives **no** hint that it ever considered the credibility of any of the witnesses or that it made any finding of fact. In his memorandum, Judge Devitt merely stated that he was free to weigh the evidence for himself and that because he had the definite and firm conviction that the jury had made a mistake, he was permitted to set aside the verdict to avoid a miscarriage of justice. He made no statement that he had substituted his judgement of the facts or the credibility of the witnesses for that of the jury. The trial court recignizing the overwhelming evidence of Pickwick's financial difficulties and David Irvin's efforts to double check the task force's recommendation and then find Petitioner another possition, in spite of the fact that other employees had been terminated by the room full, could only reach one conclusion — the weight of the evidence clearly showed that age played no role in Petitioners termination and that the jury verdict was plainly wrong.

QUESTION II

Petitioner asserts that this Court should require trial courts to provide an explanation when granting a new trial so that an appellate court can determine if there has been an abuse of discretion. (Pet. 23).

Respondent submits that although it was not required to do so, the trial court gave its reasons for granting a new trial i.e. it stated that the claim that Pickwick's personnel decisions were motivated by age discrimination was overwhelmed by the evidence.

Petitioner's assertion should also be rejected on policy grounds in that the courts have wisely recognized that motions for new trial based on the weight of the evidence are left to the discretion of the trial court, *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 194, 85 L.Ed. 147 (1940), and to do otherwise would seriously interfere with the authority and power of a trial judge in the federal system. This court has noted that a trial judge in the federal system not only has the power to comment on the weight of the evidence and discretion to grant a new trial if the verdict appears to be against the weight of the evidence, *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525, 540, 78 S.Ct. 893, 902, 2 L.Ed. 2d 953 (1958), but that the judge is not even required to enter supporting findings of fact when granting a new-trial motion. *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d. 193 (1980), fn. 3. See Fed. Rule Civ. Proc. 52 (a).

Respondent submits that this Court has spoken on a trial court's discretion to grant a new trial and that the decision should be left to the experience of the trial judge and his first hand observations in the courtroom.

CONCLUSION

For the reasons cited above, the petition for writ of certiorari should be denied.

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